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DOBLER & SONS, LLC

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOBLER & SONS, LLC, a California
limited liability company,

Plaintiff,

v.

FRESH 'N HEALTHY, INC., a Delaware
Corporation; MARK WILLIAMS, an
individual; JACK PARSON, an individual;
MARK MCCORMICK, an individual;
STEVEN CINELLI, an individual; and
PRESTWICK PARTNERS, LLC, a
California limited liability company,

Defendants.

CASE NO. C 08-00113 RS

**ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED AND
ASSIGNED TO JUDGE FOGEL**

Plaintiff Dobler & Sons, LLC ("Dobler") respectfully requests that the Court (1) find that this action is related to ASA Farms, Inc., et al., v. Fresh 'N Healthy, Inc., et al., Case No. C 08-00122 JF PVT ("ASA Farms"), (2) reassign it to Judge Jeremy Fogel, and (3) consolidate it for all purposes with the ASA Farms' action.

Both cases involve substantially the same parties, the same property, and the same legal issues, and they should be consolidated to avoid unnecessary duplication of efforts and to insure

1 that the assets at issue are distributed on a pro-rata basis, as required by the Perishable
2 Agricultural Commodities Act (“PACA”) trust provisions, 7 U.S.C. § 499(e).

3 Specifically, all plaintiffs allege that they were not paid by Defendant Fresh ‘N Healthy,
4 Inc. for produce that they supplied to it. Dobler is owed in excess of \$325,000 for the fresh
5 vegetables that it delivered to Fresh ‘N Healthy. All Plaintiffs further claim that they are the
6 beneficiaries of the PACA trust, which gives them first priority to Fresh ‘N Healthy’s assets.
7 See, Middle Mt. Land & Produce, Inc. v. Sound Commodities, Inc., 307 F.3d 1220, 1224 (9th
8 Cir. 2002) (“The trust automatically arises in favor of a perishable agricultural commodities
9 seller upon delivery of perishable agricultural commodities and is for the benefit of all unpaid
10 suppliers or sellers involved in the transaction until full payment of the sums owing in
11 connection with the transaction have been received.”); Idahoan Fresh v. Advantage Produce, 157
12 F.3d 197, 209 (3d Cir. 1998)(“Congress established the PACA trust to protect unpaid sellers
13 against buyers' failure to make prompt payment and their subordination of the sellers' claim to
14 secured creditors.”).

15 Indeed, Fresh ‘N Healthy’s produce related assets (e.g., accounts receivable) – and any
16 other assets that were maintained or purchased with produce related assets – must be distributed
17 on a *pro-rata* basis to *all* properly perfected PACA trust creditors of Fresh ‘N Healthy – not just
18 to ASA Farms, Braga Ranch, and Oceano Packing Company, LLC. C&E Enter., Inc. v. Milton
19 Poulos, Inc. (In Re Milton Poulos), 107 B.R. 715 (B.A.P. 9th Cir. 1989), *aff’d.* in relevant part,
20 947 F.2d 1351 (9th Cir. 1991)(PACA trust funds must be distributed pro-rata to all properly
21 perfected PACA trust beneficiaries); J.R. Brooks & Son, Inc. v. Norman’s Country Market, Inc.,
22 98 B.R. 47, 51 (Bankr. N.D. Fla. 1989)(“Where the trust assets are not sufficient to pay all
23 PACA claims, the trust assets should be distributed on a pro rata basis to all beneficiaries who
24 have protected their rights to the trust benefits.”); Idahoan Fresh v. Advantage Produce, 157 F.3d

1 at 205 (all properly perfected PACA trust creditors are “entitled to share in a pro-rata distribution
2 of the statutory trust res until they receive payment in full.”).

3 As the court noted in Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 159 (11th Cir. 1990):

4 “Segregation of only part of the trust solely to accommodate a beneficiary’s
5 singular interest is inappropriate because the statutory trust exists for the
6 benefit of all unpaid produce suppliers. See 7 U.S.C.A. § 499e(c)(2) (West
7 Supp. 1990). Upon a showing that the trust is being dissipated or
8 threatened with dissipation, a district court should require the
9 PACA debtor to escrow its proceeds from produce sales, identify its
10 receivables, and inventory its assets. It should then require the PACA
11 debtor to separate and maintain these produce-related assets as the PACA
12 trust for the benefit of all unpaid sellers having a bona fide claim. 7
13 U.S.C.A. § 499e(c)(3). Each beneficiary would then be entitled to its pro
14 rata share.”

15 In short, unless all actions against Fresh ‘N Healthy are considered related and are
16 consolidated, there is a real risk that Fresh ‘N Healthy’s assets – which may not to be adequate to
17 pay all of the PACA trust claims in full – will be paid to the three Plaintiffs involved in the ASA
18 Farms’ proceedings ahead of Dobler, rather than on a pro-rata basis, as required by PACA.

19 Moreover, unless the Dobler litigation is consolidated with the ASA Farms’ action,
20 Dobler will have no alternative except to seek an injunction similar to the one that Judge Fogel
21 recently issued preventing, among other things, Defendant Fresh ‘N Healthy from selling or
22 transferring “any and all assets covered by or subject to the trust provisions of the PACA without
23 agreement of the parties or until further order of the court.” Otherwise, there will only be three
24 PACA trust claims informing Judge Fogel’s decision – ASA Farms and Braga Ranch’s and the
newly intervening Plaintiff Oceano Packing Company, LLC’s – and determining which assets
may be sold or transferred.

25 In addition, Judge Fogel has set for hearing on Friday, March 21, 2008, the parties’ (to
26 the ASA litigation) request to modify the injunction to permit the sale of Fresh ‘N Healthy’s
27 assets. Of course, since Dobler is not a party to the ASA action, Judge Fogel may not take into

1 account its \$325,000 PACA trust claim when considering whether to allow a sale, whether the
2 funds from the sale should be segregated (pending determination of the PACA trust claims), and
3 the sum that should be segregated (given the claims before him). Consequently, if the Dobler
4 litigation is not consolidated with ASA Farms, Dobler will have no alternative except to seek a
5 similar injunction preventing the sale and/or transfer of Fresh 'N Healthy's assets.

6 Given Judge Fogel's familiarity with the issues and the facts and his actions to date, and
7 considering that a party may respectfully decline to have the matter heard by a Magistrate Judge,
8 it makes sense to reassign the Dobler action to Judge Fogel and to consolidate it for all purposes
9 with the ASA Farms' case.

10 Date: March 19, 2008

RYNN & JANOWSKY, LLP

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12 By: /s/ Marion I. Quesenbery
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Attorneys for Plaintiff
13 DOBLER & SONS, LLC
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